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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

TIMOTHY SHEPARD,)	Case No. 3:12-CV-00554-HDM-VPC
)	
Plaintiff,)	
)	
v.)	
)	
ERIC K. SHINSEKI, SECRETARY,)	
DEPARTMENT OF VETERANS AFFAIRS;)	
EDWARD RUSSELL, in his official capacity;)	<u>ANSWER TO COMPLAINT</u>
and ALAN BITTLER, in his official capacity,)	
)	
Defendants.)	

COME NOW Defendants Eric Shinseki, Secretary, Department of Veterans Affairs; Edward Russell, in his official capacity; and Alan Bittler, in his official capacity (collectively Defendants), by and through their undersigned counsel, and answer the complaint as follows:

JURISDICTION AND VENUE

1. Paragraph 1 sets forth the purpose of this civil action, as alleged by Plaintiff, and does not constitute allegations of fact. Therefore, no answer is required. To the extent an answer is required, Defendants deny the allegations.

2. Paragraph 2 states Plaintiff's legal conclusions regarding jurisdiction rather than allegations of fact and thus no answer is required. To the extent an answer is required, Defendants deny the allegations.

4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4. To the extent a response is required, Defendants deny Paragraph 4.

6. Defendants admit the allegations contained in Paragraph 6.

8. Defendants admit that Mr. Russell and Mr. Bittler were agents and representatives of Secretary Shinseki. Defendants deny the remainder of Paragraph 8.

9. Defendants deny the allegations contained in Paragraph 9. At the administrative level, Plaintiff's claim was whether he was discriminated against based on color (brown), national origin (Hispanic), disability (dyslexia & dysgraphia), age (over 40), and reprisal (prior EEO activity), when the agency allegedly denied him a reasonable accommodation between November 4, 2010, and January 4, 2011. Plaintiff requested a hearing with the Equal Employment Opportunity Commission on August 30, 2011. The parties, through their attorneys, stipulated and agreed that the issues to be decided at the administrative hearing would include Plaintiff's allegations of being denied a reasonable accommodation from the date of filing his complainant through the date of the hearing: the time from January 4, 2011 through August 30, 2011. That time frame exceeds 180 days.

2

1 notice of right to file a civil action within 90 days. Defendants lack knowledge or information
2 sufficient to form a belief as to the truth of the remainder of the allegations contained in Paragraph
3 10.

4 **FIRST CLAIM FOR RELIEF**

5 (Violation of 29 U.S.C. § 791 — Disability Discrimination)

6 11. Paragraph 11 of the Complaint is a statement of reincorporation to which no response
7 is necessary. To the extent an answer is required, Defendants incorporate herein their responses to
8 Paragraphs 1 through 10.

9 12. Defendants deny the allegations contained in Paragraph 12.

10 13. Defendants admit the allegations contained in Paragraph 13.

11 14. Defendants admit that during the time Plaintiff was on the Public Contact Team, there
12 were five teams: Triage, Pre-Determination, Post-Determination, Appeals and Public Contact.
13 Defendants admit that each Team performs a different function.

14 15. Defendants admit that the position description for a VSR is established by the United
15 States Department of Veterans Affairs Human Resource Center in Washington, D.C. and the pay
16 level is approved by the Office of Personnel Management. Defendants further admit that changes
17 are conducted in the same manner.

18 16. Defendants admit the allegations contained in Paragraph 16.

19 17. Defendants admit the allegations contained in Paragraph 17.

20 18. Defendants admit the allegations contained in Paragraph 18.

21 19. Defendants admit that Manual 21-1-Manual Rewrite ("M21-1-MR"), Part II, Chapter
22 1, states, "The Intake Specialist must not conduct personal interviews." Defendants deny the
23 remaining allegations contained in paragraph 19.

24 20. Defendants admit that Vice-Admiral Daniel Cooper, Veterans Affairs Undersecretary
25 for Benefits 2002-2008, put in writing that all Veterans Affairs offices utilizing VSRs must utilize
26 them in all five VSR categories. Defendants deny that the guidance continued after Vice-Admiral

1 Cooper stepped down from the position.

2 21. Defendants admit the allegations contained in Paragraph 21.

3 22. Defendants deny the allegations contained in Paragraph 22.

4 23. Defendants deny the allegations contained in Paragraph 23. Factor 3 — Guidelines
5 states:

6 Guidelines include agency manuals; *e.g.*, the M21-1, M22-2, M23-1, M21-4,
7 regulations, court decisions, directives, EDP rules-based technology, and
8 procedural requirements of the various social insurance and special and
9 supplemental security income programs. These guides are numerous,
10 extensive, and complex. While the guidelines are generally applicable, the
11 VSR must use considerable judgment in the application of regulations to
12 research and resolve complex or highly unusual cases and in adapting
13 guidelines and procedures to individual case circumstances.

14 24. Defendants admit the allegations contained in Paragraph 24.

15 25. Defendants admit that Manual 21-1-Manual Rewrite, Part II, Chapter 1, states, "The
16 Intake Specialist must not conduct personal interviews" and Intake Specialists are responsible for
17 "referring visitors to a Veterans Service Representative ("VSR"), if a personal interview is
18 warranted."

19 26. Defendants admit that before eliminating the VSRs from Public Contact, Plaintiff was
20 marked fully successful during annual performance appraisals. Defendants deny the remaining
21 allegations contained in paragraph 26.

22 27. Defendants admit that they did not officially notify Plaintiff of the transfer until July
23 2010. Defendants admit that Plaintiff submitted documents after that date that stated Plaintiff had
24 the disabilities of dyslexia and dysgraphia. Defendants deny the remainder of Paragraph 27.

25 28. Defendants admit the allegations contained in Paragraph 28.

26 29. Defendants admit that Mr. Bittler elected to follow the Intake Specialist Position
Description rather than the M21-1-MR when he noticed a conflict between the two. Defendants
further admit that Mr. Bittler notified Compensation Services, the entity responsible for the
manual, of this decision.

1 30. Defendants deny that allowing Plaintiff to remain in Public Contact as a VSR would
2 not be an accommodation. Defendants lack sufficient knowledge or information as to whether
3 Plaintiff could not do the work of a VSR Predetermination Team member with accommodations.
4 Defendants admit that Plaintiff has stated that he would not be able to perform the duties.
5 Defendants admit the remainder of Paragraph 30.

6 31. Defendants admit the allegations contained in Paragraph 31.

7 32. Defendants deny the allegations contained in Paragraph 32.

8 33. Defendants deny the allegations contained in Paragraph 33.

9 34. Defendants deny the allegations contained in Paragraph 34.

10 35. Defendants deny the allegations contained in paragraph 35.

11 36. Defendants admit that Plaintiff repeatedly requested to be placed back as a VSR in
12 Public Contact. Defendants deny the remainder of Paragraph 36.

13 37. Defendants admit the allegations contained in Paragraph 37.

14 38. Defendants are without knowledge or information sufficient to form a belief as to
15 whether Plaintiff could not do the work of a VSR Predetermination Team member with
16 accommodations. Defendants admit that Plaintiff has stated he would not be able to perform the
17 duties.

18 39. Defendants lack knowledge or information sufficient to form a belief as to the truth of
19 the allegations contained in Paragraph 39. To the extent a response is required, Defendants deny
20 the allegations contained in Paragraph 39.

21 40. Defendants deny the allegations contained in Paragraph 40.

22 41. Defendants deny the allegations contained in Paragraph 41.

23 42. Defendants deny the allegations contained in Paragraph 42.

24 43. Defendants deny the allegations contained in Paragraph 43.

25 44. Defendants deny the allegations contained in Paragraph 44.

26 45. Defendants deny the allegations contained in Paragraph 45.

JURY DEMAND

49. Defendants deny all allegations of the complaint not hereinabove expressly admitted.

1. Plaintiff has failed to state a claim upon which relief may be granted.

3. Defendants were unaware of Plaintiff's disability before making the July 2010

4. The move of Public Contact Team VSRs was based solely on business necessity, as determined by the leadership at the Reno Veterans Affairs Regional Office.

6. This action is barred by the doctrines of waiver, laches and estoppel.

7. Plaintiff has failed to exhaust his administrative remedies for the claims alleged.

6

1 9. Plaintiff has failed to mitigate his damages.

2 10. Defendants have not been properly served.

3 11. The Court lacks subject matter jurisdiction to decide this claim.

4 12. Plaintiff's employment charge was untimely submitted.

5 13. Punitive damages are not recoverable.

6 Defendants reserve the right to amend their Answer with additional defenses of which they
7 may become aware as discovery progresses and to raise any other matter constituting an avoidance
8 or affirmative defense.

9 WHEREFORE, Defendants pray for judgment as follows:

10 1. That judgment be entered in favor of Defendants and against Plaintiff,

11 2. That Plaintiff take nothing by way of his complaint,

12 3. For costs of suit and

13 4. For such other relief as may be proper.

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15 Respectfully submitted,

16 DANIEL G. BOGDEN
17 United States Attorney

18 /s/ Holly A. Vance
19 HOLLY A. VANCE
20 Assistant United States Attorney
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CERTIFICATE OF SERVICE

TIMOTHY SHEPARD,) Case No. 3:12-CV-00554-HDM-VPC
Plaintiff,)
v.)
UNITED STATES OF AMERICA,)
DEPT. OF VETERANS AFFAIRS, ET AL.,)
Defendants.)
_____)

It is hereby certified that service of the foregoing ANSWER TO COMPLAINT was made through the Court's electronic filing and notice system or, as appropriate, by sending a copy of same by first class mail, addressed to the following addressees, on this 5th day of February, 2013.

Addressee:

JEFFREY S. BLANCK, ESQ.
485 West Fifth Street
Reno, NV 89503

/s/ Holly A. Vance
HOLLY A. VANCE